

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: W.R. GRACE & CO., et al.,)
Debtors.) Chapter 11
) Case No. 01-01139 (JKF)
) (Jointly Administered)
) April 23-24, 2007 Product Identification Trial
)

**CLAIMANT STATE OF CALIFORNIA, DEPARTMENT OF GENERAL SERVICES'
POST-TRIAL CITATIONS AND REFERENCES TO TRIAL RECORD REGARDING
CLAIMANT'S THREE CLAIMS INVOLVING DEBTORS' ZONOLITE
ACOUSTICAL PLASTIC AND/OR ZONOLITE FINISH COAT**

Pursuant to the Court's direction at the conclusion of the product identification hearing held on April 23 and 24, 2007 (see 4/24/07 Hearing Trans. at 123:2-125:12; 136:7-14), the Claimant, State of California, Department of General Services ("Claimant" or "DGS") hereby provides references to the record concerning its Claim Nos. 10651, 10657 and 10659 (the "Three Claims") made against the estate W.R. Grace & Co. et. al. (the "Debtors" or "Grace").¹

**Summary of Applicable Trial Record
References Concerning ZAP/ZFC-Based Claims**

1. As stated during the trial's April 24, 2007 closing argument, Claimant respectfully submits that it met its burden to show that the buildings the subject of the Three Claims contained either or both of Grace's products Zonolite Acoustical Plaster (Plastic) ("ZAP") and Zonolite Finish Coat ("ZFC"). The evidence in the trial record supporting a ruling in favor of Claimant on the Three Claims includes: (a) testimony of both parties' experts, Dr. Tim Vander Wood and Dr. Lee, and (b) the MVA expert reports issued by Dr. Vander Wood.

¹ As the Court suggested, the parties have agreed upon the following schedule (as confirmed by email on April 27, 2007) for submissions of the post-trial citations and references: that Claimant's submission is to be served by May 1, 2007, Debtors' response by May 3, 2007, and Claimant's reply (if any) by May 4, 2007.

A. Formulas for ZAP/ZFC

2. Dr. Lee testified that the components of Debtors' formula for ZAP consisted of chrysotile asbestos, a clay called montmorillonite, both in the range of 15 to 20 percent, and 60 to 70 percent vermiculite. See 4/23/07 Hearing Trans. at 40:17-21.

3. Debtors' formula for ZFC consisted of 53-72% of vermiculite, 11-15% of bentonite (montmorillonite type), 11-14% of asbestos, 5-7% of titanium dioxide, and less than 0.5% of sodium lauryl sulfate. See Debtors' Exhibit 1 at p. 2.

B. Acceptable Variations from Debtors' "Product Formulas"

4. Dr. Vander Wood testified that certain deviations from the formulas – such as the minute presence of minerals in the sample in addition to the components called for by Grace's formula or variations in the abundances of the formula's components – are not dispositive of whether or not the Debtors manufactured the product. See 4/24/07 Hearing Trans. at 98:4-99:13.

5. Dr. Lee "accepted" the proposition that the minute presence of other minerals not called for in the Grace formula would not render the sample inconsistent with Debtors' formula if the analyst "concluded that they were not added as a constituent component." See 4/23/07 Hearing Trans. at 68:22-69:15

C. Claim No. 10657

6. Tab titled "Claim No. 10657" to Exhibit B of DGS Exhibit 25 ("MVA Report for Claim No. 10657") contains the results of the constituent analysis of sample N0044 taken from the building the subject of Claim No. 10657, which sample generated a positive match with Grace's formula for ZAP.²

² Dr. Vander Wood explained the various techniques he used to analyze the samples and which are set forth in his reports in Claim Nos. 10651, 10657 and 10659. See 4/24/07 Hearing Trans. at 22:9-32:6.

7. Dr. Lee classified this sample in the category "wrong formula." See Debtors' Exhibit 55. He testified that as to the MVA results he reviewed for this sample, "there was 15 percent chrysotile, 85 percent vermiculite and montmorillonite at less than one percent" indicating "it's not a formula in which the amount of clay and chrysotile were approximately equal" and "not consistent with the Grace formula for" ZAP. See 4/24/07 Hearing Trans. at 41:22-42:12.

8. Dr. Vander Wood testified that the notation of "less than 1% minor" at page 28 of the MVA report (DGS Exhibit 25; Debtors' Exhibit 55), was a typographical error and the page should have provided that the presence of clay was "minor." See 4/24/07 Hearing Trans. at 45:8-46:7; 80:18-21.³

9. The PLM constituent analysis in the MVA report (p. 29) for Claim No. 10657 noted that "clay may be present but could not be confirmed." See DGS Exhibit 25 at p. 29; Debtors' Exhibit 55.

10. Dr. Vander Wood testified that the "PLM analyst was not able to confirm [montmorillonite's] presence or make any estimate of its abundance. It was seen by SEM analysis, and it was seen by the TEM analysis..." See 4/24/07 Hearing Trans. at 45:8-46:1.

11. The SEM analysis in the MVA report at page 30 described the presence of montmorillonite as "minor" and the TEM (AEM) analysis in the MVA report at page 36 described the presence of smectite as "common," with the notation that "smectite properties all consistent with montmorillonite."⁴ DGS Exhibit 25 at pp. 30, 36; Debtors' Exhibit 55.

³ Dr. Vander Wood also testified as to what is meant by "common" ("you see it everywhere, it's very easy to find"); "minor" ("it's not difficult to find") and "trace" ("you see it now and then"). 4/24/07 Hearing Trans. at 97:18-98:3.

⁴ See Deer, Howie & Zussman, An Introduction to the Rock Forming Minerals (1966), p. 264 ("An alternative term once used for this type of clay is smectite and this has now been revised to describe the group as a whole (MacKenzie, 1957a), which contains the following principal members: montmorillonite.....").

12. Dr. Vander Wood testified that "TEM allows you to detect and confirm the presence of clay that might be in particles too small to be detected by PLM or so entangled with other particles that you can't distinguish them by other techniques." See 4/24/07 Hearing Trans. at 29:21-31:12.

13. Dr. Vander Wood further testified that "if you take our database and ask it for all the formulas that contain chrysotile at approximately 15 percent ... vermiculite and montmorillonite totally [sic] 85 percent and no other components, then you end up with a unique identification of Zonolite Acoustical Plastic. There are other products that contain other materials that were not present in their samples." See 4/24/07 Hearing Trans. at 43:16-44:16.

14. Dr. Vander Wood thus concluded that the significant components of sample N0044 showed a positive match with Grace's formula for ZAP. See 4/24/07 Hearing Trans. at 31:13-32:6; 44:2-46:1.

D. Claim No. 10659

15. Tab titled "Claim No. 10659" to Exhibit B of DGS Exhibit 25 ("MVA Report for Claim No. 10659") contains the results of MVA's constituent analyses of two samples taken from the building the subject of this claim, which samples were a positive match with Grace's formula for ZAP (sample N0452(A)) and ZFC (sample N0452(B)).

16. Dr. Lee classified both of these samples into the category "insufficient data," Debtors' Exhibit 57, "because the montmorillonite and titania were not quantified," 4/23/07 Hearing Trans. at 42:22-43:1.

17. The PLM analysis in the MVA report at page 126 of sample N0452(A) noted that "the presence of kaolinite is indicated by microchemical testing. Montmorillonite may be present but could not be confirmed." See DGS Exhibit 25 at p. 126; Debtors' Exhibit 57.

18. Dr. Vander Wood testified that the SEM and TEM did not show the presence of any kaolinite in the sample. See 4/24/07 Hearing Trans. at 103:3-15.

19. The SEM analysis in the MVA report (page 128) found no clay in sample N0452(A), while the AEM analysis (page 131) found the presence of "smectite" in that sample between "common/minor" with the notation that the "smectite properties are consistent with montmorillonite." See DGS Exhibit 25 at pp. 128, 131; Debtors' Exhibit 57.

20. As for the remaining sample (N0452(B)), the Data Interpretation sheet reflects the percentages of the components found – namely, chrysotile (~16%) plus vermiculite, montmorillonite and TiO₂ (titanium) (combined total of ~84%). See DGS Exhibit 25 at p. 136.

21. The PLM analysis of this sample noted "pigment and possible kaolinite (indicated by microchemical testing) are common to minor and included in the vermiculite percentage. Montmorillonite may be present but could not be confirmed". See DGS Exhibit 25 at p. 151. The AEM (page 153) and SEM (page 156) showed that no kaolinite was present, while the AEM (TEM) revealed the common presence of smectite with the note "smectite properties are consistent with montmorillonite." See id. at pp. 153, 156.

22. Dr. Vander Wood thus concluded that the significant components for samples N0452(A) and (B) showed a positive match with Grace's formula for ZAP and ZFC, respectively. See 4/24/07 Hearing Trans. at 31:13-32:6, 40:3-7, 45:8-46:1.

23. Dr. Vander Wood further explained why the MVA Report for Claim No. 10659 (and for Claim No. 10651 discussed below) had sufficient data to conclude that the product was ZAP and ZFC. See 4/24/07 Hearing Trans. at 42:2-42:24.

E. Claim No. 10651

24. Tab titled "Claim No. 10651" to Exhibit B of DGS Exhibit 25 ("MVA Report for Claim No. 10651") contains the results of the constituent analysis of two samples taken from the building the subject of this proof of claim that generated a positive match with Grace's formula for ZAP (sample N0450(A)) and ZFC (sample N0450(B)).

25. Dr. Lee classified both of these samples in the category "insufficient data," Debtors' Exhibit 49, because the amount of montmorillonite was not specified but included in the vermiculite. See 4/23/07 Hearing Trans. at 40:4-41:16.

26. For one of the samples (N0450(A)), the Data Interpretation page of the MVA Report for Claim No. 10651 reflects the percentages of the three major components contained in ZAP: chrysotile (~14%), plus vermiculite and montmorillonite (combined total of ~86%). See DGS Exhibit 25 at p. 111.

27. The PLM analysis of this sample, reflected on page 112, states that, "The presence of kaolinite is indicated by microchemical testing. Montmorillonite may be present but could not be confirmed." See id. at p. 112.

28. During the SEM analysis, the "common" presence of montmorillonite and absence of kaolinite were confirmed. See id. at 114. The results of the AEM (TEM) analysis further confirmed the absence of kaolinite and found the "common" presence of smectite, noting that, "[s]mectite particles are consistent with montmorillonite." See id. at 118.

29. For the remaining sample (N0450(B)), the Data Interpretation page reflects the percentages of the three major components contained in ZFC: chrysotile (~16%), plus vermiculite and montmorillonite (combined total of ~84%). See DGS Exhibit 25 at p. 136.

30. The PLM analysis of this sample noted that, "Pigment + possible kaolinite (indicated by microchemical testing) are common to minor and are included in the vermiculite package. Montmorillonite may be present but could not be confirmed." See id. at p. 137.

31. During the SEM analysis, the presence of montmorillonite and absence of kaolinite were confirmed. See id. at p. 139. The results of the AEM (TEM) analysis further confirmed the absence of kaolinite and found the "common" presence of smectite, with the analyst noting that, "[s]mectite properties are consistent with montmorillonite." See DGS Exhibit 25 at p. 143.

32. As with for Claim No. 10651, Dr. Vander Wood testified as to why the results for Claim No. 10651 were sufficient to conclude that it was ZAP and ZFC. See 4/24/07 Hearing Trans. at 31:13-32:6, 37:23-38:20, 42:2-44:17.

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